IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs September 22, 2009

STATE OF TENNESSEE v. THOMAS EUGENE DAVIS

Direct Appeal from the Criminal Court for Knox County
No. 80991B Bob R. McGee, Judge

No. E2008-02741-CCA-R3-CD - Filed January 12, 2010

After the trial court denied his motion to suppress evidence against him, the Defendant, Thomas Eugene Davis, pled guilty to possession with intent to sell more than .5, but less than 300, grams of cocaine, reserving several certified questions of law pursuant to Tennessee Rule of Criminal Procedure 37(b)(2). The certified questions are as follows: (1) whether the search warrant failed to sufficiently particularize the items to be seized; (2) whether officers executing the search warrant failed to comply with the "knock and announce" rule; and (3) whether officers executing the search warrant failed to serve the Defendant with a copy of the warrant. After a thorough review of the record and applicable law, we affirm the trial court's judgment.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed

ROBERT W. WEDEMEYER, J., delivered the opinion of the court, in which JAMES CURWOOD WITT, JR., and D. KELLY THOMAS, JR., JJ., joined.

Randall E. Reagan, Knoxville, Tennessee, for the Appellant, Thomas Eugene Davis.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; Jeff Blevins, Assistant District Attorney General, for the Appellee, State of Tennessee.

OPINION

I. Background

In January 2005, a Knox County grand jury indicted the Defendant on four counts: possession with intent to sell more than 300 grams of a Schedule II controlled substance, possession with intent to deliver more than 300 grams of a Schedule II controlled substance, possession with intent to sell more than twenty-six grams of a Schedule II controlled substance within one thousand feet of a public school, and possession with intent to deliver more than twenty-six grams of a Schedule II controlled substance within one thousand feet of a public school.

II. Suppression Hearing

The Defendant moved to suppress the evidence seized during a search of his business. The trial court held a hearing where the following evidence was presented: Wendy Taylor, the Defendant's friend who cleaned his business, testified that she was present at the Defendant's business, cleaning out a "junk room," on the day the warrant in this case was executed. She testified that she was carrying items to be hauled off out through the front door when police entered the building through the back door. She denied that the police announced their presence as they entered, testifying that the police merely entered, handcuffed her, and proceeded to a closed room near the back of the building. She recalled that the police then "busted the door and went in." Taylor acknowledged that she was initially charged in this case, although these charges were subsequently dropped.

On cross-examination, Taylor testified that the day of the search was the first time in a month that she had visited the building. She recalled that, although another male was with the Defendant in the back room, no one else was present in the rest of the building. She testified she arrived forty-five minutes before police entered the building, and she reiterated that she was standing near the open front door when police entered.

Upon direct examination by the trial court, Taylor clarified that ten minutes before police arrived she had carried a load of items to be hauled off and that she was standing near the front door, gathering more items to be hauled off, when the police entered through the back door. She said twenty feet separated her from where police entered through the back door.

Detective Mark Weber of the Knox County Sheriff's Department testified that he requested and obtained the search warrant in this case. According to the detective, the warrant authorized police to search the Defendant's property at 1714 West Emory Road, and it included a schematic diagram of the property with shaded areas representing the areas to be searched.

Detective Weber initially testified that he gave a copy of the warrant to the Defendant. When confronted with a transcript of his testimony from a preliminary hearing in this case, he agreed that the transcript reflected that he left the Defendant's copy of the warrant in his patrol car when he went inside and arrested the Defendant and that he did not show the Defendant the warrant when he arrested the Defendant. He said he had also testified at the preliminary hearing that, after retrieving the warrant from his car, he did not directly give the Defendant the copy of the warrant but rather left the copy on a pinball machine in the building.

Having addressed his preliminary hearing testimony, the detective testified that he recalled telling the Defendant that he was executing a search warrant. The detective recalled leaving a copy of the warrant on the pinball machine, explaining he did not give the Defendant a copy because the Defendant was being taken into custody.

Detective Weber testified that, when he executed the search warrant, he seized sixty vehicles from the property because he found no legitimate business on the property and the vehicles were not registered to the Defendant. He acknowledged he found no drugs in the vehicles. The detective recalled he also seized three bobble-head dolls, a Dale Earnhardt die cast car, a battery charger, a personal radio, a cordless drill, a drill pump, a pressure gauge, television monitors, a VCR, and cameras. He explained he seized these items because, in his experience, drug dealers commonly accept property instead of money in exchange for drugs.

On cross-examination, Detective Weber explained that he obtained the search warrant in this case by presenting the magistrate judge with information he received from a confidential informant who executed a controlled drug buy at the Defendant's property. He recalled that the warrant in this case authorized him to seize any evidence of drug trafficking, including any proceeds from or financial records of drug trafficking.

Detective Weber testified that when he arrived at the Defendant's property to execute the warrant, he knocked on the building's door and said, "Sheriff's Department, search warrant." After no one answered the door, he opened the door and walked in and saw Taylor standing near the door in the back of the first room that led to the back of the business. He recalled that after restraining Taylor, they knocked on the back door of the first room. After no one opened the door, officers forced the door open and found a man Detective Weber identified as Mr. Bowling standing near the door that lead to the back room of the trailer. Police restrained Mr. Bowling and entered the back room, where they found and arrested the Defendant.

The detective testified that, in addition to the seized items he listed on direct examination, he and fellow officers also seized cash, 15.6 ounces of cocaine, twenty-five hydrocodone pills, 100 "soma" pills, and a CD burner. He said that, in his experience, drug users commonly steal items in order to trade them for drugs. He said that, in his experience, items used to trade for drugs are commonly stolen items.

On redirect examination, the detective testified that officers photographed a collection of baseball cards they found on the property. Agreeing that the property receipts accompanying the warrant did not indicate baseball cards were seized, he said he could not explain why the baseball cards could not be found in the building after the search.

After hearing this evidence, the trial court entered a written order denying the Defendant's motion to suppress. The Defendant pled guilty to possession with intent to sell more than .5 grams but less than 300 grams of cocaine. Pursuant to Rule 37(b)(2) of the Tennessee Rules of Criminal Procedure, the Defendant reserved his right to appeal five certified questions of law, but he maintains only three of these questions on appeal. It is from this judgment that the Defendant now appeals.

III. Analysis

On appeal, the Defendant claims that the trial court erred when it admitted the evidence seized during the search of the Defendant's business. More specifically, he claims: (1) the search warrant in this case failed to sufficiently particularize the items to be seized; (2) officers executing the search warrant failed to comply with the "knock and announce" rule; and (3) the officers executing the search warrant failed to serve the Defendant with a copy of the warrant.

A. Certified Question of Law

Because this appeal comes before us as a certified question of law, pursuant to Rule 37(b) of the Tennessee Rules of Criminal Procedure, we must first determine whether the questions presented are dispositive. An appeal lies from any judgment of conviction upon a plea of guilty if the defendant entered into a plea agreement under Rule 11(a)(3) but explicitly reserved with the consent of the State and the court the right to appeal a certified question of law that is dispositive of the case. Tenn. R. Crim. Proc. 37(b)(2); *see State v. Preston*, 759 S.W.2d 647, 650 (Tenn. 1988). Further, the following are prerequisites for an appellate court's consideration of the merits of a question of law certified pursuant to Rule 37(b)(2):

> (i) The judgment of conviction, or other document to which such judgment refers that is filed before the notice of appeal, contains a statement of the certified question of law reserved by the defendant for appellate review;
>
> (ii) The question of law is stated in the judgment or document so as to identify clearly the scope and limits of the legal issue reserved;
>
> (iii) The judgment or document reflects that the certified question was expressly reserved with the consent of the state and the trial judge; and
>
> (iv) The judgment or document reflects that the defendant, the state, and the trial judge are of the opinion that the certified question is dispositive of the case . . . .

Tenn. R. Crim. P. 37(b)(2)(A)(i)-(iv).

The Defendant's issues on appeal all meet these requirements. He pled guilty, and the judgment form along with its addendum listed the questions the Defendant maintains on appeal:

> The certified questions of law that are explicitly reserved by the Defendant for appellate review and agreed to by the parties under Tenn. R. Crim. P. Rule 37(B)(2)(I)(A) and (B) are the following:
>
> > I. Whether the search warrant itself is invalid in that it fails to sufficiently particularize the items to be seized and, therefore, is a general warrant prohibited by the Fourth Amendment of the

> Constitution of the United States and Article I, § 7 of the Tennessee Constitution.
>
> II. Whether the evidence seized pursuant to the execution of the search warrant must be suppressed by violation of the "knock and announce" requirements of [Tenn. R. Crim. P. 41(e)(2)].
>
> III. Whether the evidence seized pursuant to the execution of the search warrant must be suppressed for the failure to personally serve the Defendant with a copy of the search warrant and the receipt of items seized in violation of the requirements of [Tenn. R. Crim. P. 41(e)(4) and 41(g)(6)].
> . . .
>
> The trial court, the State, and the Defendant are all of the opinion that these certified questions are dispositive of this case under [Tenn. R. Crim. P. 37(b)(2)(i)(D)].

We agree that the questions attached to the Defendant's plea agreement are dispositive of the case. According to Rule 41 of the Tennessee Rules of Criminal Procedure, if the search warrant failed to sufficiently particularize the items to be seized, if officers violated the "knock and announce" rule, or if the Defendant was not properly served with the search warrant, then any evidence gathered from the search could be excluded. We conclude that these issues are properly before this Court.

B. Search Warrant's Issuance and Execution

In general, the Defendant challenges the trial court's finding that the search warrant executed at his property at 1417 West Emory Road was legally issued and executed. According to *State v. Odom*, "a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise." 928 S.W.2d 18, 23 (Tenn. 1996). Additionally, the prevailing party in the trial court is "entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence." *Id.* Furthermore, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Id.* Despite the deference to the trial court for factual issues, this Court reviews the trial court's application of the law to the facts de novo, without any deference to the trial court's determinations. *State v. Walton*, 41 S.W.3d 75, 81 (Tenn. 2001).

1. Warrant's Issuance

The Defendant contends that the search warrant issued in this case failed to particularize the items to be seized and that, as a result, the warrant was an unlawful "general warrant." The State responds that the warrant's instruction to seize items related to controlled substances or their sale gave the warrant sufficient particularity.

The Fourth Amendment to the United States Constitution requires a search warrant to contain a particular description of the items to be seized. *See State v. Henning*, 975 S.W.2d 290, 296 (Tenn. 1998); *see also* U.S. Const. amend. IV. Furthermore, Article I, § 7 of the Tennessee Constitution prohibits general warrants, and Tennessee Code Annotated § 40-6-103 requires search warrants to describe particularly the place and property to be searched. *State v. Bostic*, 898 S.W.2d 242, 245 (Tenn. Crim. App. 1994); *see also* Tenn. Const. art. I, § 7; Tenn. Code Ann. § 40-6-103. To satisfy the particular description requirement, a warrant "'must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized.'" *State v. Meeks*, 867 S.W.2d 361, 372 (Tenn. Crim. App. 1993) (quoting *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981)); *see also Henning*, 975 S.W.2d at 296. "Where the purpose of the search is to find specific property, [the property] should be so particularly described as to preclude the possibility of seizing any other [property]. . . . [I]f the purpose [of the warrant is to seize] . . . any property of a specified character which, by reason of its character, and of the place where and the circumstances under which it may be found, if found at all, would be illicit, a description, save as to such character, place and circumstances, would be unnecessary, and ordinarily impossible." *Lea v. State*, 181 S.W.2d 351, 352-53 (Tenn. 1944); *see also Henning*, 975 S.W.2d at 296.

The prohibition against a general warrant was intended to limit governmental intrusion upon a citizen's privacy and property rights to that shown to the magistrate to be necessary to pursue a legitimate government interest. The particular description requirement is meant to leave little discretion to the officer conducting the search in order to prevent general searches and to prevent the seizure of items upon the mistaken assumption that they fall within the warrant's authorization. *See* 2 Wayne R. LaFave, Search and Seizure, § 4.6(a) (2d ed. 1987). "A general order to explore and rummage through a person's belongings is not permitted. The warrant must enable the searcher to reasonably ascertain and identify the things which are authorized to be seized." *United States v. Cook*, 657 F.2d 730, 733 (5th Cir. 1981).

The warrant in this case instructed officers to seize:

> All controlled substances, controlled substances paraphernalia, scales and mixing devices, packaging materials, any equipment, devices, records, and computers and computer discs, books or documents adapted and used for the purpose of producing, packaging, dispensing, delivering or obtaining controlled substances, or recording transactions involving controlled substances, indicia of ownership, dominion, or control over premises to be searched such as rental receipts, mortgage receipts, mortgage payments, utility bills, photographs of any persons involved in criminal conduct, all financial records pertaining to the disposition of the proceeds of the violation of the criminal laws specified above, and any goods or personal property, including US currency or negotiable instruments, used to facilitate or constituting proceeds from the violation of the criminal laws specified above, and any evidence or items which would be used to conceal the foregoing or prevent its discovery . . . .

Noting that the search warrant's language was typical of warrants to seize evidence of drug offenses and that the "complex state of drug trafficking in our community" required the warrant's complex language, the trial court found that the warrant was not an unlawful general warrant.

We agree with the trial court that the search warrant in this case sufficiently particularized the items to be seized. The search warrant was issued in order to seize items related to the trade of controlled substances, which officers suspected to have occurred on the Defendant's property. The warrant authorized officers to seize a long list of items, which generally included controlled substances, tools for the use and sale of controlled substances, and records of the sale of controlled substances. The warrant does not give a particular description of any of the items authorized to be seized. The absence of a more particularized description does not make the warrant a general warrant, however, because a warrant to seize property that is illicit by reason of its character need not provide a specific description of each item to be seized. *See Lea*, 181 S.W.2d at 352-53; *also see State v. Ronald C. Floyd*, No. E2001-03044-CCA-R3-CD, 2003 WL 21946737, at *3-4 (Tenn. Crim. App., at Knoxville, Aug. 12, 2003) (holding that a warrant that authorized officers to seize illegal drugs and their proceeds was not a general warrant), *no Tenn. R. App. P. 11 application filed*. We conclude the warrant in this case enabled the executing officers "to reasonably ascertain and identify the things which are authorized to be seized." *See Meeks*, 867 S.W.2d at 372. As such, the Defendant is not entitled to relief on this issue.

2. Warrant's Execution

a. "Knock and Announce" Compliance

The Defendant next contends the evidence seized during the search of his business should have been excluded because police violated the "knock and announce" procedures of Tennessee Rule of Criminal Procedure 41(e)(2). The State responds that the officers did, in fact, knock and announce their presence in accordance with Rule 41.

Rule 41(e)(2) of the Tennessee Rules of Criminal Procedure prescribes how an officer is to execute a search warrant:

> If, after notice of his or her authority and purpose, a law enforcement officer is not granted admittance . . . the peace officer with a search warrant may break open any door or window of a building or vehicle, or any part thereof, described to be searched in the warrant to the extent that it is reasonably necessary to execute the warrant and does not unnecessarily damage the property.

In sum, an officer who is to execute a search warrant "must give: (1) notice of his authority; and (2) the purpose of his presence at the structure to be searched." *State v. Perry*, 178 S.W.3d 739, 745 (Tenn. Crim. App. 2005) (citing *State v. Lee*, 836 S.W.2d 126, 128 (Tenn. Crim. App. 1991) and *State v. Fletcher*, 789 S.W.2d 565, 566 (Tenn. Crim. App. 1990)). These requirements may be met

by a "knock and announce" procedure, where the officer knocks on the door and announces that he has a search warrant to search the house. *Wilson v. Arkansas*, 514 U.S. 927, 933-34 (1995).

This Court has held that Tennessee Rule of Criminal Procedure 41(g), which requires exclusion of unconstitutionally seized evidence, required suppression of evidence seized in violation of "knock and announce" procedures. *State v. Curtis*, 964 S.W.2d 604, 609 (Tenn. Crim. App. 1997); *see* Tenn. R. Crim. P. 41(g)(1). We note, however, that the United States Supreme Court recently held that the United States Constitution does not require exclusion of material seized in violation of "knock and announce" procedures. *Hudson v. Michigan*, 547 U.S. 586, 599 (2006). Because we conclude in this case that the law enforcement personnel complied with the "knock and announce" requirements of Tennessee Rule of Criminal Procedure 41, it is not necessary for us to address *Hudson*'s effect upon the admissibility of evidence seized in violation of "knock and announce" procedures.

Acknowledging that Taylor testified officers did not announce their presence before entering the Defendant's property, the trial court nonetheless credited Detective Weber's testimony and found that officers properly knocked and announced their presence and, receiving no response, entered the business. We conclude the evidence does not preponderate against the trial court's finding that officers knocked and announced their presence before entering the Defendant's property. As previously stated, "[q]uestions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact." *Odom*, 928 S.W.2d at 23. The trial court was entitled to credit Detective Weber's testimony rather than Taylor's testimony. The detective's testimony that he and fellow officers knocked on a door and announced themselves before entering, therefore, supports the trial court's finding that police complied with Rule 41's "knock and announce" procedures. The Defendant is not entitled to relief on this issue.

b. Service of Warrant upon the Defendant

Finally, the Defendant claims that he was not given a copy of the search warrant at the time of the search, which is required by Rule 41(e)(4) of the Tennessee Rules of Criminal Procedure. The State counters that the officers, in accordance with Rule 41, left a copy of the warrant on the premises rather than give the copy to the Defendant because he was arrested during execution of the search warrant.

Rule 41(e)(4) of the Tennessee Rules of Criminal Procedure directs that the officer who executes a search warrant "shall: (A) give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property; or (B) shall leave the copy and receipt at a place from which the property was taken." Tenn. R. Crim. P. 41(e)(4) (2005). Rule 41(g)(6) provides that officers' "failure–where possible–[to] leave a copy of the warrant with the person or persons on whom the search warrant was served" requires exclusion of evidence seized during the warrant's execution. Tenn. R. Crim. P. 41(g)(6). Personal service of a search warrant upon a defendant, therefore, is not strictly necessary for compliance with Rule 41(e). *See State v.*

Watson, 227 S.W.3d 622, 645 (Tenn. Crim. App. 2006) (holding that service of a search warrant upon a defendant's counsel satisfied Rule 41's notice requirement).

The intent of Rule 41 is "'to secure the citizen against carelessness and abuse in the issuance and execution of search warrants.'" *State v. Coffee*, 54 S.W.3d 231, 233 (Tenn. 2001) (quoting *Talley v. State*, 345 S.W.2d 867, 869 (Tenn. 1961)). The purpose of providing notice to the owner of seized property is to notify the owner of the source of the seizure so that the owner can pursue available remedies for its return. *City of West Covina v. Perkins*, 525 U.S. 234, 240 (1999). However, "the prevailing view is that noncompliance with . . . [notice] does not compel exclusion of the evidence obtained pursuant to the warrant, at least absent prejudice to the defendant or a deliberate disregard of the notice provision." 2 Wayne R. LaFave, Search and Seizure, § 4.12(b) (4th ed. 2004) (footnote omitted).

In this case, the trial court found that officers executing the search warrant complied with Rule 41 because they left a copy of the search warrant and the receipt at the Defendant's property. Indeed, Detective Weber testified that, although he did not serve the Defendant personally with the search warrant, he left a copy of the search warrant on a pinball machine in the Defendant's business. He explained that he did not serve the Defendant with the warrant because the Defendant was taken into custody during the search. The record, therefore, does not preponderate against the trial court's finding that police left a copy of the search warrant on the Defendant's property.

Further, we agree with the trial court's assessment of the officers' compliance with Rule 41 in this case. Detective Weber left a copy of the search warrant at the Defendant's business because the Defendant was taken into custody during the search. Where, as here, personal service of a warrant upon a defendant is "not possible," leaving a copy of the warrant at the place searched satisfies Rule 41's notice requirement. *See* Tenn. R. Crim. P. 41(e)(4) and (g)(6). Detective Weber did not violate Rule 41 when he elected to leave a copy of the search warrant on the property rather than to provide the Defendant with the copy. *See* Tenn. R. Crim. P. 41. As such, the Defendant is not entitled to relief on this issue.

III. Conclusion

After a thorough review of the law and relevant authorities, we conclude the trial court did not err in suppressing the evidence seized during the search of the Defendant's property. As such, we affirm the judgment of the trial court.

ROBERT W. WEDEMEYER, JUDGE